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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1058.
CIVIL.

MIDLAND COOPERATIVE WHOLESALE,
PETITIONER,
VS.
HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF, RESPONDENTS.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Comes now the petitioner and presents this Petition for Rehearing on its Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit (which was denied on April 27, 1942) and respectfully suggests:

A.

The point that the decision of the court below is in conflict with the public policy of the State of Minnesota as expressed in its Cooperative Statutes was not raised in the petition for writ of certiorari. It is requested, therefore, that the court consider now this new reason for vacating its order and granting the petition for writ of certiorari.

The Cooperative Statutes of the State of Minnesota (R. 102) authorize the incorporation of cooperative associations for the purpose of conducting any lawful business by five or more incorporators, without respect to occupational requirements on the part of the incorporators. No distinction is made in the Minnesota law in question between so-called farmers' cooperative associations and so-called consumers' cooperative associations.

The applicable provisions of the Minnesota law (R. 102), Chapter 326, Laws of Minnesota, 1923, follow:

> "7834. Co-Operative Associations—Who May Organize—Purpose—Powers—A co-operative association may be formed for the purpose of conducting any agricultural, dairy, marketing, transportation, warehousing, commission, contracting, building, mining, telephone, manufacturing, or any mechanical, mercantile or electrical heat, light or power business, or for all such purposes or for any other lawful purpose, upon the co-operative plan, * * *
>
> "For the purpose of this act a co-operative association shall be defined as any corporation or association of ultimate producers and/or consumers organized under this act or any other statute of the State of Minnesota now existing or hereafter enacted providing for the incorporation of co-operative associations; also any central organization composed wholly or in part of such associations. The plans of organization and the business practices of any such association shall be stated in its articles of incorporation and by-laws and shall provide (a) that the ownership of capital stock therein by any individual stockholder shall not exceed the par value of $1,000; and (b) that in-

dividual stockholders shall be restricted to only one vote in the affairs of the association; and (c) that shares of stock shall not be transferable except with the approval and consent of the governing board of such association; and (d) that interest shall not be paid on outstanding or paid-up capital stock of the association in excess of 6% per annum; and (e) that the net income of such association, except such amounts as are required to be set aside as a reserve fund or permanent surplus or may be set aside by vote of the stockholders of the association, available for distribution, among the members, or patrons, or both as the case may be, shall be distributed only on the basis of patronage."

"7835. Organizers—Articles of Incorporation—Contents and Filing—A co-operative association may be organized under the provisions of this act by five or more incorporators, who may act for themselves as individuals or as the agents of other co-operative associations, whether organized under this act or otherwise."

The opinion in question (R. 141, l. c. 166) of the Circuit Court of Appeals reported in 125 F. 2d 618, l. c. 634, includes the following principal holding of the case:

"It is of course true that there is nothing inherently evil in petitioner's practice of giving patronage dividends to its retail cooperative members, and that such dividends partake in no way of the unsavory character normally associated with rebates. But regardless of moral connotations, the Act is explicit in prohibiting 'a discount, dividend, allowance, or rebates' whereby a retailer or industrial consumer is enabled to purchase coal at a price below the minimum price established under the Act. It is clear that what is prohibited here is any device which permits a code member to furnish coal to a retailer or consumer at a price below the minimum; since patronage dividends clearly tend to do so they are embraced within this broad prohibition."

Petitioner expresses the conviction that the aforesaid summary of the opinion of the court below is in conflict

with the public policy of the State of Minnesota as expressed in its Cooperative Statutes. The court below clearly states that patronage dividends are unlawful because they tend to allow retailers and consumers to purchase coal at a price below the minimum price fixed by the Division. Still, it states that there is nothing inherently evil in them.

The Bituminous Coal Act of 1937 was intended to be helpful to the consumer. No part of it tends to indicate that the Congress was intending to prevent the consumer from getting coal through legally controlled marketing channels at a price below the minimum. The Congress intended to eliminate evils. It intended to eliminate the evils which former Justice Cardozo said "have degraded the bituminous coal industry into anarchy." It is not an evil for consumers to provide coal for themselves through cooperative associations at cost. The retail association, being a mere link in the chain, does not gain any benefit or any unfair advantage over its competitors. The holding of the court below is therefore not only in conflict with the intent of Congress toward the interest of consumers of coal, but it is in conflict with the intent of the Cooperative Statutes of the State of Minnesota.

Minnesota is the cradle of the cooperative movement in the United States. At the beginning of the year 1939, there were 1,471 active cooperative associations in Minnesota, being more cooperative associations than are found in any other state. It is 13% of all of the cooperative associations in the United States. During the ten year period from 1910 to 1920, 1,218 farmers' cooperative associations were incorporated in Minnesota. This is a greater number than have been incorporated in any other state during any ten year period. Moreover, the cooperative movement assumed mass proportions in Minnesota relatively earlier than in any of the other states.

Also, the North Central States, comprising the group of states wherein petitioner's member associations are in-

corporated, contain nearly two-thirds of all of the farmers' cooperatives in the United States. More than 30% of them lie in the specific states wherein petitioner's retail cooperative member associations are incorporated.

So far as the State of Minnesota is concerned, the incorporation of cooperative associations is not limited to farmers' associations, either farmers' producing associations or farmers' purchasing associations. Consumers, without respect to occupational groups, may freely incorporate cooperative associations under the laws of the State of Minnesota to engage in any kind of cooperative enterprises.

If the greater portion of the 1,471 active cooperative associations incorporated under the laws of the State of Minnesota are controlled by farmers, it is because the cooperative movement has found a greater response among farmers than other occupational groups. Notwithstanding such fact, the laws of Minnesota invite all occupational groups to incorporate to carry on any kind of business enterprises on the cooperative plan. Therefore, the fact that the greater portion of the 1,471 active cooperative associations in the State of Minnesota are farmers' associations does not minimize petitioner's contentions that the opinion of the court below which holds that patronage savings of cooperative associations organized in Minnesota are the legal equivalent of unlawful rebates and price allowances is in conflict with the public policy of the State of Minnesota. It is the Minnesota law itself which signifies the public policy of that State, and not the type of cooperative associations which are organized under it.

Petitioner will undertake now to explain that the opinion of the court below is in conflict with the public policy of the State of Minnesota by approaching the matter from a new point of view.

Laws of Minnesota, 1939, page 794, Chapter 403, Sections 1 to 7, being an amendment to a statute enacted

in former years, prescribes certain prohibitions against unfair trade practices of retail vendors and wholesale vendors. Prosecutions and penalties for violations are provided.

Any retail vendor or wholesale vendor who sells merchandise in the State of Minnesota at a price less than the price determined from the provisions of the Act, for the purpose or with the effect of injuring competitors or destroying competition, shall be deemed guilty of the violation of the Act.

It is suggested that the legal principle in the Minnesota Unfair Trade Practices Act is the same as that of the Bituminous Coal Act of 1937 which prohibits rebating or the making of price allowances. Therefore, if the Minnesota law prohibiting retail and wholesale vendors from making price allowances reaches patronage savings of cooperative associations incorporated under the Laws of Minnesota, all of the cooperative associations in Minnesota which sell to consumers, whether controlled by farmers or other occupational groups, are at the present time operating in violation of the State Unfair Trade Practices Act. Undoubtedly, they sell at prices below the minimum, if the distribution of patronage savings constitutes an adjustment in price.

It is presumed, however, that Minnesota's cooperative associations are operating in compliance with state laws. Hence the conflict between the Bituminous Coal Act of 1937 and the public policy of the State of Minnesota arises.

Petitioner respectfully contends that it is not the public policy of the State of Minnesota as expressed through its laws to characterize patronage savings distributed by the State's 1,471 active cooperative associations as the legal equivalent of price allowances or rebates. It is urged that the making of price allowances prohibited in the Minnesota Unfair Trade Practices Act are identical in legal nature with the price allowances prohibited in the Bituminous Coal Act of 1937.

A similar act prohibiting unfair trade practices is upon the statute books of more than forty states. It is the duty of the states' attorneys to prosecute violations of the laws mentioned. Petitioner suggests that it is within the common knowledge that there is no such campaign of law enforcement against cooperative associations throughout the nation.

Petitioner urgently requests the Court to consider carefully its suggestion that it is not requesting a general declaratory judgment on the question of the legal nature of patronage savings of cooperative associations. It is true that the legal question involved affects seriously cooperative associations of every kind throughout the United States. Nevertheless, petitioner recognizes the necessity of confining the legal question concerning patronage savings to their treatment within the provisions of the Bituminous Coal Act of 1937. Therefore, it is hoped that the Court will not disapprove on the ground that petitioner is going far away from the legal question involved for the purpose of asking for a general declaratory judgment on the legal question involved.

B.

The public importance of the case and of the legal question involved justifies the request that the Court should vacate its order denying certiorari and grant a rehearing on the petition for writ of certiorari.

In *State of Georgia* v. *Hiram W. Evans et al.*, decided April 27, 1942, 86 L. Ed. 929 (Adv. Op.), the Court took jurisdiction because the intervention by means of *amicus curiae* briefs of more than thirty states indicated a question of public importance.

It is acknowledged, of course, that it is within the discretion of the Court to determine when the public importance of a case is great enough to confer jurisdiction upon it. However, petitioner respectfully states that, based upon its best impression of the public importance of

the case of *Georgia* v. *Evans, supra,* the present case is of equal public importance. If it may be assumed that the case of *Georgia* v. *Evans, supra,* represents the first time any state has brought an action for treble damages under the provisions of the Anti-Trust Statute, a fair deduction can be made that like causes of action for treble damages under the Anti-Trust Statute in favor of the respective states will occur only rarely in the future. The case arose to one of sufficient public importance to confer jurisdiction, undoubtedly, because more than thirty states filed *amicus curiae* briefs.

Petitioner earnestly suggests that if the cooperative associations throughout the United States, of which there are approximately 15,000, were alert to the dangers of the legal precedence established by the opinion of the Circuit Court of Appeals, and were able financially, like the states, to employ counsel to represent them, very many *amicus curiae* briefs would have been filed in support of petitioner's case in the Circuit Court of Appeals and also in the Supreme Court in support of petitioner's petition for writ of certiorari. Petitioner desires to suggest that such support would come not only from consumers' cooperative associations, but from so-called *bona fide* and legitimate farmers' cooperative associations as well. The opinion of the Circuit Court of Appeals places a cloud upon the title of cooperative associations among farmers to operate without hindrance under state laws. The interests of farmers' cooperative associations are affected seriously, notwithstanding the so-called "exemption" which the court below holds has been extended to farmers' cooperative associations under the provisions of paragraph 13 of Section 4 II (i) of the Bituminous Coal Act of 1937.

As has been stated heretofore in this petition, the regulation alleged to be authorized will destroy the coal business of wholesale cooperative associations which purchase coal for resale to retail cooperative associations

which are consumers' cooperative associations. Moreover, the holding of the court below will engender active prejudice among opponents of the cooperative movement. It is best, therefore, that the Supreme Court should decide the legal questions involved so that cooperative associations may know now whither they are traveling, so that they can request Congress and the state legislatures, if necessary, to supply corrective legislation.

In further pleading the public importance of the legal question arising under the provisions of the Bituminous Coal Act of 1937, petitioner requests the Court to take judicial knowledge of the fact that there is a dynamic surge among consumers all over the nation to provide themselves with the necessities of life, at cost, by means of the democratic principles of cooperation.

Fuel, including bituminous coal, is one of the necessities of life. The opinion under consideration holds that the Congress, in exercising its constitutional authority to protect interstate commerce, has set up a regulatory pattern which excludes from the field of competition in the bituminous coal business wholesale cooperative associations which purchase coal for resale to member associations which are consumers' retail cooperative associations.

It is not required that there shall be in progress an active crusade among consumers to enter cooperative associations as a means of supplying themselves with the necessities of life, including coal as fuel, in order for the question involved to be one of great public importance. The fact that public thought is veering steadily and surely toward the philosophy of economic and social security through cooperative practices is sufficient in itself to confer jurisdiction.

Cooperative associations generally, and consumers' cooperative associations in particular, will suffer in prestige as the result of the opinion of the Circuit Court of Appeals. The cardinal principle of cooperatives to be free

to operate in any field to procure necessities of life for consumers at cost is destroyed.

In Special Report No. 89 of the United States Department of Agriculture, Farm Credit Administration, published in July, 1941, entitled "Survey of National Cooperatives, Incorporated," by Joseph G. Knapp, petitioner, is listed as one of the fifteen large, member wholesale associations serving the needs of consumers primarily. It is conceded that, as yet, farmers, as consumers, dominate and control in most of these large wholesale consumers associations.

Minnesota is the only state in which more than one of these large wholesale associations serving consumers is located. Two of them are located in Minnesota. The total value of sales of consumers' supplies at wholesale in 1940 was $48,338,867.77. The same associations sold supplies at retail in the amount of $2,718,233.05 for the same year. The consumers' supplies handled include petroleum products, tires, tubes, automobile accessories, electrical equipment and appliances, farm machinery, hardware and tools, lumber, paint and roofing, steel and wire fence, feed, seed, fertilizer, twine, insect and fly spray, coal, groceries, and miscellaneous supplies. Eight of the wholesale associations were shown as handling coal in 1940.

The names and locations of the fifteen associations follow:

Indiana Farm Bureau Cooperative Association, Inc., Indianapolis, Indiana.

Farmers Cooperative Exchange, Inc., Raleigh, North Carolina.

Consumers Cooperative Association, North Kansas City, Missouri.

Farmers Union Central Exchange, South St. Paul Minnesota.

Central Cooperative Wholesale, Superior, Wisconsin.

Pennsylvania Farm Bureau Cooperative Association, Harrisburg, Pennsylvania.

Midland Cooperative Wholesale, Minneapolis, Minnesota.

Central States Cooperative, Inc., Chicago, Illinois.

Eastern Cooperative Wholesale, Inc., Brooklyn, New York.

Farm Bureau Services, Lansing, Michigan.

Pacific Supply Cooperative, Walla Walla, Washington.

Consumers Cooperatives Associated, Amarillo, Texas.

Farm Bureau Cooperative Association, Columbus, Ohio.

Saskatchewan Cooperative Wholesale Society, Ltd., Saskatoon, Saskatchewan, Canada.

United Farmers Cooperative Company, Ltd., Toronto, Ontario, Canada.

Petitioner, as an active member of National Cooperatives, Incorporated, states that the consumer movement among cooperatives, without respect to occupational groups, is expanding rapidly. Moreover, there is a tendency toward a thorough blending of all occupational groups into consumers' cooperatives without respect to specific name or identity of such groups. The non-farm groups are manifesting an active interest in cooperative endeavor at a rapid rate. Educational leaders are placing more emphasis upon the consumers' movement, generally, without reference to occupational groups. Where state laws are drafted primarily for the benefit of farmers as producers and purchasers of farm supplies, there is strong pressure to stretch corporate charters to serve consumers generally, notwithstanding the inadequacy of the state laws. In Minnesota, however, state laws are adequate to include all occupational groups in the consumers' movement for cooperative endeavor. The public policy in that State has long since been settled.

Regardless of the final outcome, the cooperative movement among consumers should not be compelled to grope

in darkness. Under the present opinion of the court below it is without a chart and compass. The public interest is so great as legally to warrant that the Supreme Court should act. Indeed, the cooperative movement among consumers of whatsoever occupational groups will be better served with an intelligent, elucidating opinion from the Supreme Court against it than to be required to meet the prejudice that the present opinion of the court below will engender. The opinion is a cloud upon the legal character of farmers' associations, whether consumers' associations consisting of farmers or producers associations, consisting of farmers. In respect to consumers' associations composed of occupational groups other than farmers, the opinion sounds the death knell. It should be reviewed.

Finally, petitioner draws the attention of the Court to the fact that the Consumers' Counsel Division created under the Bituminous Coal Act of 1937 appeared (R. 36) and took an active interest in behalf of petitioner's application when it was heard before the Bituminous Coal Division. Petitioner also directs the attention of the Court to the fact that The Cooperative League of the United States of America was represented (R. 36) at the hearing by Mr. John Carson, its Washington Representative. The Consumers' Counsel Division filed a brief (R. 114) and its active interest in the case is recognized (R. 119) in the order of the Director of the Bituminous Coal Division.

The fact that the Consumers' Counsel Division and The Cooperative League of the United States of America took an active interest in the case when it was heard by the Bituminous Coal Division emphasizes the public importance of the legal question involved. The fact that the Consumers' Counsel Division and The Cooperative League of the United States of America did not pursue the case on appeal and on the filing of petition for certiorari in the Supreme Court should not detract from the public importance of the case.

C.

Petitioner feels justified in asking the court to grant rehearing to reconsider its petition for writ of certiorari on the ground that the legal nature of patronage savings of cooperative associations raises an important question of Federal law which has not been but should be settled by the Supreme Court.

In *Gray* v. *Powell*, 86 L. Ed. 285 (Adv. Op.), wherein the Seaboard Air Line Railway Company was held not to be a "producer" of coal and therefore not entitled to exemption under the Bituminous Coal Act of 1937, the court said:

> "As the question of Federal law was important and unsettled by any decision of this Court, certiorari was granted, * * *"

Therefore, upon the authority of the case of *Gray* v. *Powell, supra,* it seems that the question of Federal law, which has not been settled by any decision of the Supreme Court, is important enough to warrant the Supreme Court to take jurisdiction to review the opinion.

An opinion of one of the lower courts of the United States which holds that the Congress, under its constitutional authority to protect interstate commerce, has launched a regulatory program which may in time destroy cooperative associations incorporated under state laws and thereby nullify those state laws is a far-reaching and important one. It contains an important question of Federal law which the Supreme Court should review.

In their brief in opposition to the petition for writ of certiorari, respondents (R. 16) concede that this is "the only case in which the point has been raised." Petitioner would appreciate the opportunity to explain to the Court its conception of the legal distinction between patronage savings and the rebates or price allowances which are prohibited by paragraph 12 of Section II (i) of the Bituminous Coal Act of 1937. If given the opportunity to

do so, it feels confident that it can convince the Court that the Circuit Court of Appeals committed error on this point. It is a point of important Federal law which has never been decided by the Supreme Court.

D.

Petitioner apprehends that the court did not give sufficient attention to its contention that the holding of the court below on the question of congressional intent is in conflict with the cases cited in petitioner's suggestions.

The opinion of court below lays great stress upon the legislative history of an effort on the part of consumers' cooperatives to have the Congress adopt an amendment to paragraph 13 of Section 4 II (i). The opinion presumes that this paragraph is an "exemption" to farmers' cooperative associations, whereas petitioner urges that it is merely an interpretative provision to prevent misunderstanding.

The executive order of the President in NRA days is cited by the court below as illustrative of the contention that patronage savings of cooperative associations are within the prohibitions of the Bituminous Coal Act of 1937. The President's order in the NRA situation only proves petitioner's contention here. First, the President can not construe the law. He did not undertake to construe the NRA code. Construction of the law is for the courts. The President merely interpreted the NRA law. He merely told his subordinates that he did not interpret the NRA Act to include within its prohibitions the patronage savings of cooperative associations. Therefore, he informed his subordinates that he did not desire that they should enforce the NRA law in a manner which would include patronage savings of cooperative associations.

It has frequently been held that where a proposed amendment is defeated, the legislative intent is not to be construed as embracing the effect of the language rejected. *U. S. v. Delaware & Hudson Co.*, 213 U. S. 366, 414, 53 L.

Ed. 515; *Pa. Ry. Co.* v. *Int'l Coal Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Lapina* v. *Williams*, 232 U. S. 78, 89, 58 L. Ed. 515; *Fox* v. *Std. Oil Co.*, 294 U. S. 87, 96, 79 L. Ed. 780.

Without legal justification, the opinion of the court below holds that patronage savings of consumers' cooperatives are within the prohibitions of paragraph 12 of Section 4 II (i). There is nothing in the Act itself showing an intention to include consumers' cooperatives. The Division and the court below justify the holding solely on the ground that consumers' cooperatives, allegedly, endeavored to have themselves brought within the so-called exemption of paragraph 13 of Section 4 II (i). Since those endeavors resulted in failure, it is held that patronage savings of consumers' cooperatives are within the prohibitions of paragraph 12 of Section 4 II (i). Such holding should be reviewed. It is in conflict with the cases cited, *supra.*

Even if farmers' cooperative associations are within the prohibitions of the Act, it does not follow that consumers' cooperative associations are likewise within them. By the same reasoning applied by the Court below, it may be logically contended that Congress was free to include farmers' cooperative associations and to leave out consumers' cooperative associations. There is no express provision in the Act showing that Congress intended to include consumers' cooperative associations. In fact, the only provision in the Act tending to show that Congress intended to include farmers' associations is the so-called exemption provided them in paragraph 13 of Section 4 II (i). If petitioner's contentions are correct, namely, that such provision is solely one of interpretation to prevent misunderstanding, it is correct to say that the Act not only does not expressly include farmers' cooperative associations but that paragraph 13 of Section 4 II (i) manifests an intention of Congress to say clearly that farmers' cooperative associations are not within the Congressional intent.

Therefore, the only basis for the holding that patronage savings of Consumers' cooperative associations are within the intent of Congress and therefore within the prohibitions of paragraph 12 of Section 4 II (i) is the holding of the Division and the court below that patronage savings and rebates or price allowances are legally the same thing.

If the Court will agree with petitioner that such holding is the sole basis of bringing patronage savings within the prohibitions of the Act, it is believed it will grant a rehearing. Surely, without express language by Congress that patronage savings of consumers' cooperatives are intended to be within the Act, the Court will deem the Federal to be one of sufficient importance to review it.

E.

The court has overlooked the fact that there is no finding of fact that the distribution of patronage savings by petitioner affects interstate commerce.

The Division made the sole finding that

> "Under paragraph 13 of Section 4 II (i) of the Act, sales to *bona fide* and legitimate farmers' cooperatives may involve the granting of a 'discount, dividend, allowance or rebates' though such sales generally would be an unfair trade practice under paragraph 12."

But the Division by means of such mere recitation of the statute does not find from the evidence presented at the hearing that interstate commerce would be affected injuriously, or otherwise, by petitioner's practices. Hence the Court should not assume that the distribution of patronage savings are, as a matter of fact, injurious to interstate commerce in bituminous coal.

The Division finds that the statute prohibits rebates and price allowances as unfair trade practices. That is conceded. It is conceded also that petitioner distributes

its patronage savings under the laws of Minnesota. Thereupon, the Division finds, as a matter of law, that petitioner's operations are unlawful in the respects under consideration.

Therefore, the Court should clearly recognize that the record does not show that petitioner's practices are, as a matter of fact, injurious to interstate commerce. Indeed, the court below in speaking of petitioner's practices (R. 166) finds that,

> "It is of course true that there is nothing inherently evil in petitioner's practice of giving patronage dividends to its retail cooperative members, and that such dividends partake in no way of the unsavory character normally associated with rebates."

This explanation is included, lest the Court should have believed at the time it denied certiorari that the record discloses, as a finding of fact, that petitioner's distribution of patronage savings injuriously affects interstate commerce. Upon making this point clear, the Court is invited to understand that the only question involved is a legal one, namely, whether patronage savings and rebates and price allowances are by legal nature the same thing and that, if so, their distribution, as a matter of law, should be prohibited without the necessity of a finding of fact that they injuriously affect interstate commerce. It is true that the granting of rebates and making of price allowances are declared in the Act itself to be unfair practices in competition. Therefore, it is important for the Court to review the question in order to determine whether patronage savings and rebates and price allowances are the same thing, legally, or by inherent nature.

Petitioner itself would admit that if a clear finding of fact, either by the Congress or the Division, that the distribution of patronage savings are legally the same thing as rebates or price allowances (and are therefore within the body of evil intended to be cured), and in-

juriously affect interstate commerce, the Congress has power under the commerce clause of the constitution to take the necessary steps to protect such commerce from injury. But it is unbelievable that the Congress has made such a legislative finding of fact. Not once during the long legislative history of the coal Act did it consider the practices of cooperative associations. Moreover, there is no express language in the Act itself tending to show the Congress so intended. Finally, the Division and the court below concede that no administrative finding of fact has been made. Reliance is placed solely upon the interpretation of paragraph 12 of Section 4 II (i), to bring petitioner's patronage savings within the scope of the prohibitions therein.

It is believed that this further explanation of the situation should persuade that Court that the question is purely one of law. The holding of the Division and the court below is not based upon any legislative or administrative finding of fact that patronage savings injuriously affect interstate commerce. Hence the legal question is one of great importance in Federal law.

F.

The court, apparently, gave no consideration to petitioner's point that the order is so erroneous as to warrant that the court should exercise its supervisory powers. Surely, if the court should determine that the order is actually in serious conflict with procedural principles, it would exercise its supervisory powers.

Petitioner states with much conviction that the Court has not given consideration to the point. It will, therefore, analyze the order in this respect again.

First, the order authorizes petitioner to engage in the coal business as an "intervening agency" in a dual capacity, *i. e.,* (a) with its member associations which are so-called "*bona fide* and legitimate farmers' associations," and (b) with its member associations which are so-called

consumers' cooperative associations. Petitioner may receive from producers the allowable discount fixed by the Bituminous Coal Division on coal which it purchases for resale to its member associations which are farmers' associations. Petitioner, however, is prohibited from receiving the allowable discount on coal which it purchases for resale ("to others") to its member associations which are consumers' associations. There is, therefore, a dual standard set up. Petitioner must keep two sets of accounts, one in connection with coal purchased for resale to its farmers' associations and one in connection with coal purchased for resale to its consumers' associations.

Such dual standard itself is bad from a practical standpoint but it is not a point of legal objection to the order. It is explained to direct attention to the legal objection to the form of the order.

The legal objection to the form of the order is that it sanctions unlawful rebating on the part of petitioner in dealing with its consumers' associations.

In order to weigh the seriousness of the situation, the Court should assume that petitioner will engage in the coal business under the terms of the order. If it does the order will work out as described in the following paragraph.

Petitioner will purchase coal from producers for resale to its retail member associations which are consumers' associations at the minimum price, but it will not be allowed thereon to receive the discount fixed by the Division. Let it be assumed that petitioner will purchase coal from producers for resale to its consumers' associations at a minimum price of $2.25 per ton. Let it be assumed, further, that petitioner will sell such coal to one of its consumers' associations at $2.75 per ton, the market price in the territory. Here is a margin of 50c per ton, out of which to pay distribution costs. Petitioner may save some of this 50c. If it does, it will distribute it back to its consumers' associations who purchased coal

from it. It is legally obligated under the Minnesota law and its charter to do so.

Hence, if paragraph 12 of Section 4 II (i) of the coal Act is to be construed consistently, any distribution of savings made on this 50c constitutes rebating or the making of a price allowance prohibited therein. Therefore, the order itself sanctions rebating of savings from this source. The order provides for a law violation which the Division is supposed to prevent. Petitioner would within the terms of the order do specifically that which the Division says it cannot do generally, *i. e.*, make a rebate or a price allowance.

The Act does not limit the prohibition of rebating or the making of price allowances to the discount. It prohibits all rebating and making of price allowances. It does not provide that rebating of savings derived from a particular source is prohibited, but allowed if derived from another source.

Petitioner believes it is justified in saying that the form of the order is bad because it clearly authorizes petitioner to violate the law in distributing patronage savings derived from any amount added to the minimum price.

It is urged with great sincerity that the Court has not considered the order from the point of view herein explained. The Court should not allow an order of a Federal administrative agency to stand which authorizes the violation of the statute which the administrative agency is obliged to enforce. The matter is, it seems, important enough for the Court to exercise its supervisory powers to disapprove an order which sanctions violation of a Federal statute.

It should not be assumed that petitioner will be driven from the coal business by the destructive nature of the order and that nothing of importance in a practical way will occur. That is what will probably occur, if the order stands. However, the form of the order is bad. It is an undesirable legal pattern. Its bad form and the bad re-

sults sanctioned thereby warrants an exercise of the supervisory powers of the Court.

If it should be assumed that petitioner will engage in business under the order, it will immediately be in violation of the Act, under the sanction of the inconsistent order. Petitioner should choose not to operate under the terms of an order which authorizes it to violate the Act. However, if it should be justified in operating under subsection (b) of the order, would the Division not then be compelled to act? Will the Division act then to stop petitioner from rebating in the manner sanctioned by its own order? The matter should be settled now. It is an important question of procedural law.

Petitioner asks the Court, therefore, to reconsider its point on the question of Congressional intent.

Conclusion.

Another case bringing the question of the legal nature of patronage savings of cooperative associations may not reach the Supreme Court in many years to come. The precedent of the opinion of the court below will in the meantime discourage cooperatives which are consumers' cooperatives from going into the coal business. The case holds that the Congress intended to create a regulatory pattern within the bituminous coal industry, the practical effect of which is to exclude consumers' cooperative associations from this particular field of interstate competitive enterprise. The case holds that farmers' cooperative associations are "exempted." It is in conflict with the laws of Minnesota and other states under which cooperative associations are, indiscriminatively, incorporated. It is against the public interest.

The Court should take judicial knowledge of the intensive national interest in the principles of cooperation as a practical means of providing an economic and social program of a higher order than that which is provided through the profit system. This fact alone is sufficient to confer jurisdiction on the Court to review the opinion of

the court below. It is within the common knowledge that the President has more than once expressed his interest in consumers' cooperatives as a practical means of providing better national and international trade relations. His personal and official advisers have expressed the public importance of the movement from time to time. So have leaders in Congress. The Court is no doubt familiar with such facts. Its alertness to them should be manifested in the setting aside of the order denying certiorari and in granting a rehearing thereon.

Today the Court has rejected principles of substantive law which it embraced yesterday. Petitioner is asking the Court to liberalize its rule of procedural law applied when it denied *certiorari*.

The Court has knowledge of the present importance of the cooperative movement. It realizes that the legal question involved transcends a mere single application or series of applications under the Bituminous Coal Act of 1937. It is not required to consider narrowly the procedural question of whether it shall review the case. It has sufficient constitutional and statutory authority to exercise its discretion broadly in the public interest. It may with judicial wisdom forecast public needs and events. It, with entire propriety, may base its decision to review this case upon such a forecasting of public interest and coming events. It is requested to act upon such broad powers of judicial discretion. In so doing it would not be expressing itself as to what the public policy should be. It would only (and with great propriety) lay a judicial cornerstone upon which a wise public policy may be built. Legislative action in the public interest is often impeded or fettered due to the fact judicial opinions have not sufficiently thrown light either upon the present surroundings or upon the pathway ahead.

It seems improper that petitioner should be confronted with the need or temptation to put on a campaign among cooperatives or others to file *amicus curiae* briefs to convince the Court of the public importance of

the case. Reasonable procedural rules should exclude such action.

The Court is well informed on general economic and social trends. It is not bound by procedural fetters. It may act on its sole knowledge and judgment. That is what petitioner is pleading with the Court to do.

WHEREFORE, petitioner requests the Court to vacate its order of April 27, 1942, denying its petition for writ of certiorari and to reconsider said petition.

Respectfully submitted,

DANIEL C. ROGERS,
Attorney for Petitioner.

Certificate of Counsel.

Daniel C. Rogers, undersigned counsel for petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

DANIEL C. ROGERS,
Attorney for Petitioner.